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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Case No. 71-732

MERLE R. SCHNECKLOTH, Superintendent, California Conservation Center,

Petitioner,

VS.

ROBERT CLYDE BUSTAMONTE,

Respondent.

(On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit)

BRIEF OF THE STATE OF ILLINOIS AND OF THE AMERICANS FOR EFFECTIVE LAW ENFORCEMENT AS AMICI CURIAE ON BEHALF OF THE PETITIONER

INTEREST OF THE *AMICI CURIAE*

The scope of relief available to state prisoners under Title 28 U. S. C. § 2241 is of vital concern to each of the states since it is they who bear the primary responsibility for enforcement of the criminal process in this country. With the broadening category of issues cognizable by way of federal habeas corpus, the crucial element of finality of state criminal convictions has been lost. The federal habeas courts presently act as courts of review of state criminal proceedings and readily redetermine the substantive merits of issues which have been fully and fairly litigated in the state courts and which have no bearing on the legality of the detention from which relief is sought.

This procedure has resulted in an ever increasing number of federal petitions attacking virtually every aspect of state criminal proceedings and has totally subverted the original purposes of the writ of habeas corpus along with the concept that a criminal judgment at some point must become final in order to serve society's interest in enforcing its criminal laws.

The State of Illinois has a particular interest in this case since Illinois criminal convictions are being subjected to a constantly increasing attack in the federal courts. Within the three year period 1969-1971, approximately 550 petitions for writs of habeas corpus have been filed in the federal courts attacking the validity of Illinois criminal convictions.

Accordingly, the State of Illinois, with the sponsorship of its Attorney General, offers this brief in support of the petitioner's argument that the scope of relief available

to state prisoners by way of federal habeas corpus should be limited to exclude claimed violations of the exclusionary rule.* The State of Illinois is joined in this brief by the Americans For Effective Law Enforcement.

Americans For Effective Law Enforcement, Inc. (AELE), is a national, not-for-profit, non-partisan, non-political organization incorporated under the laws of the State of Illinois. AELE has received a tax exempt ruling from the Internal Revenue Service as an educational corporation. As stated in its by-laws, the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

AELE believes that one of the most effective means of accomplishing these purposes is through the filing of briefs *amicus curiae* in cases of crucial significance with regard to the enforcement of the criminal law. In its *amicus* advocacy AELE seeks to represent the concern of the average citizen with the problems of crime and lawlessness in this country and to represent the desire of the

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* The State of Illinois also has an interest in the determination of the issue concerning the validity of the consent to search and adheres to the petitioner's treatment of the issue.

vast majority of our citizens for effective law enforcement, commensurate with the protection of the rights of individuals. We further seek to articulate to the courts the very real practical problems which confront law enforcement officers in order that the courts may weigh such problems in deciding cases which will have a vital impact on the effectiveness of the law enforcement process as a whole.

THE SCOPE OF RELIEF AVAILABLE TO STATE PRISONERS BY WAY OF FEDERAL HABEAS CORPUS SHOULD BE LIMITED TO EXCLUDE CLAIMS OF UNREASONABLE SEARCHES AND SEIZURES.

Prior decisions of this Court have found the remedy of federal habeas corpus to be available to state prisoners alleging that evidence obtained in violation of the Fourth Amendment was admitted against them at trial. *Kaufman* v. *United States,* 394 U.S. 217 (1969); *Mancusi* v. *DeForte,* 392 U.S. 364 (1968); *Carafas* v. *La Vallee,* 391 U.S. 234 (1968); *Warden, Maryland Penitentiary* v. *Hayden,* 387 U.S. 294 (1967). This finding should be reconsidered by this Court and reversed. Neither the historical function of the writ of habeas corpus at common law, nor the present statute conferring jurisdiction upon federal courts to issue the writ requires the conclusion that state prisoners must be allowed to raise and adjudicate anew alleged violations of the exclusionary rule which have been fully considered and determined in the state courts. The Constitution certainly does not require it and there are sound legal and policy reasons supporting the foreclosure of this avenue of collateral attack to prisoners in custody pursuant to convictions in the courts of a state.

The federal Constitution provides only that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U. S. Const., Art. I, sect. 9. The term "habeas corpus" is not defined nor is the scope of the remedy available in any way delimited by the Constitution. The first statutory enactment authorizing the federal courts to issue the writ was the Judiciary Act of 1789, 1 Stat. 81 (1789) which stated only that the courts of the United States "shall have power to issue writs of . . . habeas corpus . . ."[1]. Again, the substantive effect of this authorization was undefined.

This Court thus was compelled to look beyond the constitutional and statutory provisions to the common law to determine the function and scope of the writ of habeas corpus at the time the term was incorporated in the federal Constitution. *Ex parte Ballman*, 8 U. S. 75 (1807); *Ex parte Kearney*, 20 U. S. 38 (1822); *Ex parte Watkins*, 28 U. S. 193 (1830). At common law, the writ was not available to persons convicted of an offense by a court of competent jurisdiction, but rather served as a protection against illegal restraint by requiring that an accused either be charged or released.[2] Habeas corpus never performed the function of a writ of error to review questions of law or fact which had been distinct-

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1. This statute authorized issuance of the writ only to those persons in custody pursuant to federal judgment. The federal courts had no authority to grant the writ to persons in custody pursuant to state law until 1867.

2. See 31 Car. II, C. 2, § 6 (1679) for the statutory enactment of the functions of the writ at common law which was in force in England at the time the federal Constitution included the term "habeas corpus".

ly placed in issue and determined by a court of competent jurisdiction. *Ex parte Watkins, supra.*

Consistently with these principles, this Court interpreted the Judiciary Act of 1789 to preclude consideration on habeas corpus of issues of fact or law which had been determined by the trial court having jurisdiction even though such issues might have been decided erroneously. *Ex parte Watkins,* 28 U. S. at 202.

This principle was broadened in two respects by subsequent decisions. First, this Court found habeas corpus available to consider claims that the sentence imposed by the trial court was illegal. *Ex parte Lange,* 85 U. S. 163 (1873); *Ex parte Wilson,* 114 U. S. 417 (1885); *In re Snow,* 120 U. S. 274 (1887); and *Nielsen, Petitioner,* 131 U. S. 176 (1889). Second, claims of unconstitutionality relating to the statute creating the offense of which the petitioner was convicted could be tested collaterally by habeas corpus. This latter practice was based upon the premise that a conviction under an unconstitutional statute was void and precluded the trial court from ever acquiring jurisdiction over the cause. *Ex parte Siebold,* 100 U. S. 371 (1879). But see *Ex parte Parks,* 93 U. S. 18 (1876) and *Ex parte Yarbrough,* 110 U. S. 651 (1884) precluding consideration on habeas corpus of claims that the indictment pursuant to which the petitioner was tried failed to state an offense.

During this period of expansion of the scope of the writ, federal criminal convictions generally were not reviewable by appeal. See Hart and Wechsler, *The Federal Courts and the Federal System,* 1313-17 (1953). Significantly, with the expansion of the right to appeal in federal criminal cases came a restriction on the availability of the writ of habeas corpus. Repudiating *Siebold, supra,*

this Court held that issues relating to the constitutionality of the statute creating the offense were properly determined by appeal rather than by application for habeas corpus relief. See *Salinger* v. *Loisel*, 265 U.S. 224 (1924). However, even under this Court's relatively expansive reading of the availability of the writ, it was never utilized to review determinations of fact or of law made by courts of competent jurisdiction and upon which a criminal conviction was based. The writ never served the function of a writ of error.

The Habeas Corpus Act of 1867 first extended the availability of the writ of habeas corpus to persons detained pursuant to state authority. In relevant part, the Act conferred upon the federal courts the power to issue the writ "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States". Through an erroneous interpretation of the legislative intent in promulgating this Act and through an overbroad reading of the early cases decided under it, this Court has reached the conclusion that the statute conferred upon the federal courts jurisdiction to reconsider and redetermine all constitutional questions involved in state criminal litigation. There is no expressed legislative intent supportive of such a conclusion. And further, the early cases decided under this statute clearly adhered to the pre-existing limitations on the availability of the writ. It is only from an expansive reading of some of the broad language of these opinions that the present scope of issues reviewable on habeas corpus has evolved. See *Rowe* v. *Peyton*, 383 F. 2d 709, 716 (4th Cir. 1967) *affm'd. Peyton* v. *Rowe*, 391 U. S. 54 (1968).

The legislative history of the 1867 Act utterly fails to establish that Congress intended to extend the scope of

federal habeas corpus to allow review of all federal questions raised in either state or federal criminal cases.[3] As Professor Bator notes in his article "Finality in Criminal Law", 76 Harv. L. Rev. 441, 475-77 (1963):

> "The strikingly sparse legislative history does not seem to me to furnish such evidence. The act of 1867 received only the most perfunctory attention and consideration in the Congress; indeed, there were complaints that its effect could not be understood at all. Neither house made any inquiry into the scope or purposes of review to be afforded on habeas corpus. And there is no indication whatever that the bill intended to change the general nature of the classical habeas jurisdiction: that is, that it intended to expand the classes or categories of questions which were thought to be appropriately tested on collateral attack". (footnotes omitted)

Likewise, Judge Wyzanski reflected in *Geagan* v. *Gavin*, 181 F. Supp. 466, 468, (Mass. 1960), *aff'd.* 292 F. 2d 244 (1st Cir. 1961), *cert. den.* 370 U. S. 903 (1962):

> "Congress did not use language, and there was nothing in the avowed purpose of legislative history of the 1867 statute, which compelled the Supreme Court of the United States to interpret the statute as conferring upon United States District Judges authority to inquire whether a state court judgment by a jurisdictionally competent court rested upon any procedural step or substantive ruling involving a violation of the United States Constitution".

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3. The focus of the Act was the addition of a new class of persons to whom the writ would be available. It was not an expansion of the substantive scope of the writ. See Fay v. Noia, 372 U. S. 391, 448, 453 (1963) (Mr. Justice Harlan, dissenting).

And indeed, this Court initially agreed that the Act did not have the effect of extending federal authority to reconsider determinations of federal constitutional questions unrelated to the jurisdiction of the trial court. Each of the early cases decided by this Court involving the application of the statute to state detentions involved issues relating to the jurisdiction of the trial court which were properly amenable to collateral attack prior to the adoption of the 1867 statute. See *Ex parte Royall*, 117 U.S. 241 (1886) (constitutionality of statute);[4] *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886) (constitutionality of statute); *In re Rahrer*, 140 U.S. 545 (1891) (constitutionality of statute); *Crowley* v. *Christianson*, 137 U.S. 86 (1890) (constitutionality of statute); *In re Frederick*, 149 U.S. 70 (1893) (constitutionality of statute); *McElvaine* v. *Brush*, 142 U.S. 155 (1891) (constitutionality of statute).

In fact, this Court affirmatively held that the Habeas Corpus Act of 1867 did not empower the federal courts to redetermine non-jurisdictional issues arising under the Constitution. *Wood* v. *Brush*, 140 U.S. 278 (1891). In *Wood*, the petitioner sought relief by federal habeas corpus from a New York murder conviction upon the allegation that both the grand and petit jury in his case had

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4. Even as to jurisdictional issues, this Court required the exhaustion of state remedies including the writ of error to this Court, In re Frederick, 149 U.S. 70 (1893); Darr v. Burford, 339 U.S. 200 (1950); before the judgment of a state court could be collaterally attacked on federal habeas corpus. Thus, the state courts were given the opportunity to decide in the first instance all questions of fact and law including those which the federal court had the power to determine by way of habeas corpus.

been selected in a racially discriminatory manner. Affirming the denial of habeas corpus relief by the lower federal court, Mr. Justice Harlan stated:

> "Whether the grand jurors who found the indictment and the petit jurors who tried the appellant were or were not selected in conformity with the laws of New York—which laws, we have seen, are not obnoxious to the objection that they discriminate against citizens of the African race because of their race—was a question which the trial court was entirely competent to decide. and its determination could not be reviewed by the circuit court of the United States, upon a writ of habeas corpus, without making that writ serve the purposes of a writ of error. No such authority is given to the circuit courts of the United States by the statutes defining and regulating their jurisdiction. It often occurs in the progress of a criminal trial in a state court, proceeding under a statute not repugnant to the constitution of the United States, that questions occur which involve the construction of that instrument and the determination of rights asserted under it. But that does not justify an interference with its proceedings by a circuit court of the United States upon a writ of habeas corpus sued out by the accused either during or after the trial in the state court, for "upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them"; and, "if they fail therein, and withhold or deny rights, privileges, or immunities secured by the constitution and laws of the United States the party aggrieved may bring the case from the highest court of the state in which the question could be decided to this court for final and conclusive determination . . . The statute under

which the appellant was prosecuted is not repugnant to the constitution of the United States, and the court that tried him, we repeat, was competent to guard and enforce every right secured to him by that instrument, and which might be involved in his trial. The petition for the writ sets forth no ground affecting its jurisdiction either of the offense charged or of the person alleged to have committed it. If the question of the exclusion of citizens of the African race from the lists of grand and petit jurors had been made during the trial in the court of general sessions, and erroneously decided against the appellant, such error in decision would not have made the judgment of conviction void, or his detention under it illegal. Nor would that error, of itself, have authorized the circuit court of the United States, upon writ of habeas corpus, to review the decision or disturb the custody of the accused by the state authorities. The remedy, in such case, for the accused, was to sue out a writ of error from this court to the highest court of the state having cognizance of the matter, whose judgment, if adverse to him in respect to any right, privilege, or immunity, specially claimed under the constitution or laws of the United States, could have been re-examined, and reversed, affirmed, or modified by this court as the law required". (140 U.S. 278, 11 S. Ct. 738, 741-42) (citations omitted).

These principles were accepted and followed by this Court in subsequent decisions. *In re Jugiro,* 140 U.S. 291 (1891) (denying authority of federal courts on habeas corpus to decide issues of competency of counsel and discriminatory jury selection); *Andrews* v. *Swartz,* 156 U.S. 272 (1895) (discriminatory jury selection); *Bergemann* v. *Backer,* 157 U.S. 655 (1895); *In re Eckart,* 166 U.S. 481 (1897) (method of returning jury verdicts).

Prior to *Brown* v. *Allen,* 344 U.S. 443 (1963), this Court consistently adhered to the view that the Act of

1867 had not expanded the substantive scope of habeas corpus but had only added to the class of persons to whom the writ was available. This Court never interpreted the Act as allowing federal collateral attack of all constitutional questions raised in a state criminal trial. The vitality of the rule that only those questions relating to the jurisdiction of the trial court to act were properly before the federal courts on habeas corpus remained intact.

The only dimension added to the concept of habeas corpus during this period dealt with the power of the federal courts to intervene in those cases in which the state court procedures were ineffective to fairly determine the constitutional claim being presented. In *Frank* v. *Mangum,* 237 U. S. 309 (1915) a state prisoner alleged in the state courts that his murder trial had been mob-dominated. On review in the state supreme court, that court considered the trial court record and additional, extensive affidavits and reached the conclusion that the claim had not been established. A writ of error was denied by the Supreme Court of the United States.

The prisoner requested relief by federal habeas corpus, alleging that he had been convicted in violation of due process of law. In affirming the denial of habeas corpus, this Court noted that if in fact, the prisoner had been convicted by a mob-dominated court and the state supplied no corrective process, he would have been denied due process of law. However, the Court continued that if the state supplies such corrective process (in that case a motion for new trial with the right to appeal therefrom) even though the final state determination of the substantive issue may be erroneous, the requirements of

due process have been met.[5] The federal courts may not substitute their judgment for that of the state court or understake any general review of the state proceedings. The Court concluded:

> "we hold that such a determination of the facts as was thus made by the court of last resort of Georgia respecting the alleged interference with the trial through disorder and manifestation of hostile sentiment cannot, in this collateral inquiry, be treated as a nullity, but must be taken as setting forth the truth of the matter; certainly until some reasonable ground is shown for an inference that the court which rendered it either was wanting in jurisdiction, or at least erred in the exercise of its jurisdiction; and that the mere assertion by the prisoner that the facts of the matter are other than the state court, upon full investigation determined them to be, will not be deemed sufficient to raise an issue respecting the correctness of that determination". (237 U. S. 309, 35 S. Ct. 582, 590).[6]

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5. For cases in which this Court found the state procedures to be inadequate to test the federal claim being asserted, see Moore v. Dempsey, 261 U. S. 86 (1923); Mooney v. Holohan, 294 U. S. 103 (1935); Ex parte Hawk, 321 U. S. 114 (1944); White v. Ragen, 324 U. S. 760 (1945); Woods v. Nierstheimer, 328 U. S. 211 (1946); Jennings v. Illinois, 342 U. S. 104 (1951); Daniels v. Allen, 344 U.S. 443 (1953).

The same principle also was applied to federal prisoners. The writ thus was available to persons under federal detention to test issues which otherwise could not have been adequately considered by the courts. Johnson v. Zerbst, 304 U. S. 458 (1938); Walker v. Johnston, 312 U. S. 275 (1941); Waley v. Johnston, 316 U. S. 101 (1942).

6. Frank raised an additional issue relating to his involuntary absence from the courtroom at the rendition

Thus, prior to *Brown* v. *Allen, supra,* the substantive scope of federal habeas corpus available to persons under state detention was limited to claims relating to the jurisdiction of the state trial court and to constitutional issues for which the state had provided no adequate opportunity for full and fair consideration. The writ remained unavailable to consider constitutional claims which had been fully and fairly considered and decided by the state courts even though the decision reached by the state tribunal may have been erroneous.

Suddenly, in *Brown,* this Court radically expanded federal authority to issue the writ by holding that habeas corpus was available to a state prisoner alleging that the cause of his detention was an erroneous state determination of a constitutional question. This step was taken without any discussion of the authority upon which it was based and without any explanation of the reasons thought to necessitate it. Indeed the lack of discussion of such a radical expansion of the writ belies the expectation that much thought actually was given to the substantive effect of the Court's decision.

The issue in *Brown* was whether Brown's conviction was secured through the use of a coerced confession. This issue had been fully litigated in the state courts and decided adversely to Brown. This Court denied certiorari. Brown then filed a petition for federal habeas corpus upon the basis that his confession had in fact been coerced and the issue erroneously determined by the state

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of the verdict. The state court had held this issue to be waived by failure to include it in the motion for new trial. This Court found the state rule requiring the issue to be raised in the motion for new trial to be a reasonable procedure comporting with due process and did not reconsider the merits of the substantive claim.

courts. Until *Brown*, such a claim clearly was not available as a basis upon which to collaterally attack a state criminal conviction on federal habeas corpus. *Wood* v. *Brush*, 140 U. S. 278 (1891).

Yet this Court, without any discussion of the justification for such a rule, announced that a federal court may deny the writ without conducting a hearing if the court is satisfied not only that "the state process has given fair consideration to the issues and the offered evidence", but that the state court has reached *"a satisfactory conclusion"*. (344 U. S. at 463) (emphasis added). In effect, what the Court did was to hold that the statutory availability of the writ to those persons "in custody in violation of the Constitution" included those persons whose detention was based upon an erroneous, although jurisdictionally competent, determination of all questions arising under the federal constitution. This was never the function of the writ at common law nor is it consistent with the statutory authorization of the federal courts to issue the writ as that authorization had been consistently interpreted prior to *Brown*.

Regardless of the authority conferred by the fourteenth amendment and regardless of the degree to which the provisions of the first ten amendments are deemed to be incorporated therein, it must be remembered that the power to issue the writ is defined by statute. Title 28 U. S. C. § 2241. The authority of the lower federal courts necessarily is circumscribed by that statute. It is clear that at the time of the passage of the Habeas Corpus Act of 1867 (which is the antecedent of the present Title 28 U. S. C. § 2241) detention "in violation of the Constitution" meant detention pursuant to an unconstitutional statute or pursuant to a state proceeding in which

the person in custody had been deprived of any adequate opportunity to have claims of constitutional irregularities fully and fairly considered in the state courts. It did not mean detention pursuant to a state proceeding in which constitutional issues had been presented, fully considered and decided (in the opinion of a federal court judge) erroneously. Thus, for purposes of federal habeas corpus, no person in state custody pursuant to a conviction by a court of competent jurisdiction who had been given an opportunity to fully and fairly litigate all constitutional issues in the state courts, with the possibility of ultimate resort to this Court was in custody "in violation of the Constitution".

The result of the overboard reading of the statutory language by this Court in *Brown* has resulted in full review by the federal courts of all constitutional issues raised and fairly decided by state tribunals. *Irvin* v. *Dowd*, 359 U. S. 394 (1959). In effect, a federal court on habeas corpus now sits as a court of review over the state courts, and performs what is normally an appellate function. Not only is this result the product of an unwarranted and unauthorized judicial expansion of federal statutory authority, it is a result which is severely detrimental in its effect on the administration of criminal justice in this country.

The state and federal judiciaries are equally subservient to the federal constitution. Both are equally charged with the responsibility of zealously guarding the constitutional rights of every litigant. Yet, after a full and fair determination of issues arising under the Constitution by a state trial judge and by several state appellate judges and after a denial of relief by this Court, these same issues are now fully reviewable by one dis-

trict judge on a petition for federal habeas corpus. Not only does this procedure undermine the very integrity of the state determination and significantly debilitate the authority of the state judiciary, it introduces a total lack of finality to state criminal convictions. Such an absence of finality is detrimental to the efficient functioning of both state and federal courts and even more significantly is detrimental to the person under state detention.

The most effective deterrent to crime is the imposition of punishment which is certain and immediate. The expanded nature of federal habeas corpus has destroyed both the certainty and the immediacy of punishment. The prisoner, although serving a sentence, no longer accepts the fact of his conviction and the necessity of constructively serving the sentence imposed. Rather, the inmate's energies are focused toward convincing the federal court of the invalidity of his conviction. This effect is readily apparent from the greatly increased numbers of habeas petitions being filed since *Brown.*[7]

The person in custody does not have to accept the idea that he is being punished and that such punishment has been justly imposed. He may file successive petitions for relief in the federal courts. He is never forced to focus his energies in the direction of any programs for educa-

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7. The situation has been worsened by decisions subsequent to Brown and Irvin which have relaxed or totally obliterated the procedural requirement of exhaustion of available state remedies and undermined the principle that an independent and adequate state basis for the conviction would support the judgment despite an erroneous determination of a federal constitutional claim. See Fay v. Noia, 372 U.S. 391 (1963); Jackson v. Denno, 378 U.S. 368 (1964).

tion and rehabilitation provided by the institution to which he has been committed. Even if he is never successful in the federal court, the time spent upon commitment for a criminal offense has not served any of the purposes of punishment: the confinement does not serve as a deterrent for future criminal conduct by the individual since he has never accepted the fact that he is being justly punished; the prison has been unable to make significant inroads toward rehabilitation through education or technical training because the inmate's attention and concern have been focused upon obtaining federal relief which in all probability will result in his complete freedom from confinement.[8]

The instant case provides perhaps the best example of the basic unsoundness of allowing federal habeas courts to act as courts of review in determining constitutional issues raised and decided in state proceedings.

Bustamonte was arrested on January 31, 1967, at which time the automobile search was conducted which is now alleged to have been unreasonable. Following a full hearing, including the testimony and cross examination of witnesses, the state trial judge denied the motion to suppress. Respondent was convicted on April 21, 1967, of possession of a completed check with intent to defraud. On appeal, the California Court of Appeal reconsidered Bustamonte's allegation that the search and seizure vio-

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8. In most cases, by the time a case reaches and proceeds through the federal courts after full state appellate and/or post conviction litigation has been completed, the state will be precluded from retrying a successful petitioner due to the lapse of time and the unavailability of witnesses.

lated the fourth amendment and rejected the claim. The California Supreme Court denied a petition for leave to appeal on May 8, 1969. Bustamonte did not petition this Court for a writ of certiorari.

Respondent filed a petition for federal habeas corpus relief on February 10, 1970. He again alleged as grounds for issuance of the writ that the search of January 31, 1967 was unreasonable and thus violated the fourth amendment. The district judge denied the writ and Bustamonte appealed. On September 13, 1971, the Court of Appeals for the Ninth Circuit vacated the District Court order denying the writ and remanded the case for further proceedings on the basis that the California courts applied an improper standard in determining whether the consent to search was valid.

Thus, three years and five months after his conviction and following a consideration and rejection of the illegal search and seizure claim by eleven state and one federal judge, Bustamonte finally found in the Court of Appeals for the Ninth Circuit a judicial tribunal which appears to have agreed with his claim that the fourth amendment issue had been erroneously decided by twelve other judges. This finding, as with any determination made by a trial court or by a court of review is not necessarily correct. It is merely the most recent determination of the issue.

Issues concerning the reasonableness of searches and seizures are among the most difficult in the law. They are highly subject to inconsistent resolution. And once the issue is resolved, the consequence of a fourth amendment violation is the total exclusion at trial of evidence produced by the search. *Mapp* v. *Ohio,* 367 U. S. 643 (1961).

The efficacy of the exclusionary rule itself is highly questionable. The stated purpose of the rule is to deter illegal police conduct. *Linkletter* v. *Walker,* 381 U. S. 618, 636-37 (1965). Completely trustworthy evidence thus is suppressed in the hope that police misconduct will be discouraged.

Experience with the rule, however, reflects that "it is both conceptually sterile and practically ineffective in accomplishing its stated objective". *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U. S. 388 (1971) (Mr. Chief Justice Burger, dissenting). See also Oaks, "Studying The Exclusionary Rule in Search and Seizure", 37 U. Chi. L. Rev. 665 (1970).

There are several reasons for the practical failure of the rule. First, it imposes no direct sanction on the individual police officer although it is his misconduct which the rule seeks to deter. Rather, the prosecutor is the person directly affected, and he normally has no control or authority over police practices.

Second, enforcement of the exclusionary rule has not educated the police in the sense of establishing working rules as to what conduct is in fact prohibited. This is due in part to the disinclination of policemen to read appellate court opinions and to their lack of training in interpreting judicial guidelines set forth in cases in which the issues are difficult and their resolutions highly controversial. The problem is compounded by the lengthy time lag between the original police conduct and the ultimate determination of the legal issue.

Third, and most significantly, any deterrent value is substantially minimized because the benefits of the rule are available only to those persons charged with a crime.

Thus, a large proportion of day-to-day police work is completely unaffected by the existence of the exclusionary rule.

This lack of effectiveness in practice glaringly highlights the inappropriateness of application of the exclusionary principle to fourth amendment claims. Unlike other areas in which the doctrine of suppression is applied, an illegal seizure has no effect upon the trustworthiness of the seized evidence. Often such evidence alone conclusively establishes a defendant's guilt. And further, the admission of such evidence in no way impugns the basic fairness of the trial. See *Linkletter* v. *Walker, supra,* at 639. Yet once the search and seizure is found to be unreasonable, regardless of whether the police error is flagrant and intentional or minor and inadvertent, the exclusionary rule operates to render the evidence totally inadmissible. Compare *Irvine* v. *California,* 347 U. S. 128 (1954) and *Miller* v. *United States,* 357 U. S. 301 (1958). As this Court noted in *Irvine:*

> "Rejection of the evidence does nothing to punish the wrongdoing official, while it may, and likely will, release the wrongdoing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches". (347 U. S. 128, 136).

Society pays a high price indeed for rigid judicial adherence to a formalistic procedure which is theoretically inappropriate and which utterly fails to fulfill in practice its expressed purpose.

The basic deficiencies of the fourth amendment suppression doctrine are only compounded by decisions sub-

sequent to *Brown* v. *Allen, supra,* allowing claimed exclusionary rule violations as a basis for collateral attack of an otherwise final state criminal conviction by way of federal habeas corpus. The direct application of the rule to state criminal proceedings as required by *Mapp* v. *Ohio, supra.,* is theoretically unwise and practically ineffective. Allowing the rule to serve as a basis for collateral attack serves no purpose at all.

Mr. Justice Black's comments in dissent from the holding that exclusionary rule violations may be raised by federal prisoners to collaterally attack a criminal conviction in a post conviction proceeding under Title 28 U. S. C. § 2255 are equally applicable in this case. *Kaufman* v. *United States,* 394 U. S. 217, 231 (1969). Acknowledging that the sole purpose of the exclusionary rule is to deter police misconduct, Mr. Justice Black continues:

> "How this purpose can be served by the broad and unqualified rule adopted by the Court today is something of a mystery. Of course, the shortcomings inherent in any human system make it impossible to eliminate entirely all the incentives to conduct an illegal search. It would seem rather fanciful, however, to suggest that these inevitable incentives would be decreased to any significant extent by the fact that if a conviction is obtained after adequate opportunities have been provided to litigate constitutional claims, and if this conviction is upheld by all the reviewing courts, the validity of the search and seizure may later be questioned in a collateral proceeding. Understandably, the Court does not make any such suggestion and indeed makes no effort to justify its result in terms of the long-recognized deterrent purpose of the exclusionary rule". (394 U. S. at 238-39).

Thus, apart from any basic impropriety in the exclusionary rule itself, its basic purpose is not fostered by the use

of the rule as a ground for federal habeas corpus relief. Similar claims unrelated to the basic integrity of the fact finding process were never cognizable in federal habeas corpus proceedings prior to *Brown* v. *Allen*. They should not be now.

While much of the rhetoric characterizing the writ of habeas corpus as the ultimate protector of fundamental liberty and the most basic safeguard against illegal restraint is true, it must also be remembered that "the writ has potentialities for evil as well as for good". *Brown* v. *Allen*, 344 U.S. 443, 488 (1953) (Mr. Justice Frankfurter, dissenting).

We have such an example of the writ's "potential for evil" in the instant case. Resulting from an overbroad judicial expansion of federal authority to issue the writ, the federal courts now are redetermining the substantive merit of claimed exclusionary rule violations which have been fully litigated and decided by the state courts. Even assuming that the conclusion reached herein by eleven state judges regarding the merits of the claim is erroneous, a full and fair determination of the issue, although erroneous, does not render the state detention illegal or in violation of the Constitution. The federal courts thus have no statutory authority to consider the allegation anew upon a petition for federal habeas corpus.

A judicial expansion of authority is most inappropriate in a case where the expanded authority is utilized to consider state applications of the exclusionary rule—a rule which is ineffective to accomplish its stated objectives during the course of direct litigation of fourth amendment issues having no relation to the basic integrity of the factfinding process at trial or even to the issue of the guilt or innocence of the person under deten-

tion. This Court therefore should exclude claimed exclusionary rule violations which have been fully litigated and decided in the state courts from collateral reconsideration under Title 28 U. S. C. § 2241.

CONCLUSION

For the foregoing reasons, the State of Illinois and the Americans for Effective Law Enforcement as *amici curiae* on behalf of the petitioner herein, respectfully request this Court to remand this case to the Court of Appeals for the Ninth Circuit with directions to vacate its opinion and to affirm the judgment of the District Court.

Respectfully submitted,

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